STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

of

BMW PIZZA, INC. D/B/A DOMINO'S PIZZA DETERMINATION DTA NO. 809687

for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1989 through January 1, 1991.

Petitioner, BMW Pizza, Inc. d/b/a Domino's Pizza, c/o Steven M. Coren, Esq., 8 West 40th Street, New York, New York 10018, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1989 through January 1, 1991.

Petitioner, appearing by its representative, Steven M. Coren, P.C. (Steven M. Coren, Esq., of counsel), and the Division of Taxation, appearing by William F. Collins, Esq. (Arnold M. Glass, Esq., of counsel), consented to have the controversy determined on submission without hearing by their signatures on August 29, 1994 and September 9, 1994, respectively, with all briefs to be filed by January 20, 1995. On October 14, 1994, the Division of Tax Appeals was in receipt of documents provided by the Division of Taxation. The Division of Taxation thereafter failed to submit a timely brief. On January 13, 1995, petitioner set forth its position in a letter in lieu of a brief. After due consideration of the record, Catherine M. Bennett, Administrative Law Judge, hereby renders the following determination.

<u>ISSUES</u>

- I. Whether petitioner, the purchaser in a bulk sales transaction, is liable for sales tax due from the seller, Whaley Enterprises, Inc., in accordance with Tax Law § 1141(c).
- II. Whether 20 NYCRR former 537.2(c)(6) is within the authority of the Tax Law and consistent with section 1141(c).

III. Whether the Division of Taxation may hold petitioner responsible for penalties and interest.

FINDINGS OF FACT

The parties in this matter stipulated to the following facts.

On December 15, 1990, petitioner, BMW Pizza, Inc. ("BMW"), mailed a Notification of Sale, Transfer or Assignment in Bulk (AU-196.10) to the Division of Taxation ("Division") regarding a certain pending bulk sale of assets (i.e., BMW's intended purchase of all of the assets of a Domino's Pizza franchise) located at 200 East 89th Street, New York, New York from Whaley Enterprises, Inc. ("Whaley").

The Division received the notification from BMW on December 17, 1990.

On December 19, 1990, the Division issued a Notice of Claim to Purchaser, addressed to BMW, and a Notice to Escrow Agent, addressed to Howard S. Eilen, Esq.

On December 31, 1990, the Division issued a Notice to the Seller, addressed to Whaley. On January 29, 1991, the Division wrote to Whaley asking for the submission of certain documents for audit.

The bulk sale of assets took place on January 1, 1991.

The Division mailed two notices of determination to BMW on March 22, 1991. Notice of Determination #S910322712C demanded tax in the amount of \$1,000.00 and Notice of Determination #S910322713C demanded tax in the amount of \$66,886.23.

BMW timely filed an administrative protest and request for conciliation conference on June 24, 1991.

After a conciliation conference, a Conciliation Order was issued on August 21, 1992 which cancelled Notice #S910322712C and reduced the tax asserted on Notice #S910322713C to \$17,077.13. Such amount is the amount shown due on the quarterly return filed late by the seller, without remittance, for the quarter ending August 31, 1990. A copy of the return is included with documents submitted. The letters NR in handwriting in the upper right hand corner of the return indicate that no remittance was received. There is no stipulation as to the

correctness of the figures shown on the return.

BMW filed a petition for hearing with the Division of Tax Appeals on December 7, 1992.

The Division served its answer to the petition on February 9, 1993.

Tax Law § 1141(c) provides, in relevant part:

"Whenever a person required to collect tax shall make a sale, transfer, or assignment in bulk of any part or the whole of his business assets, otherwise than in the ordinary course of business, the purchaser, transferee or assignee shall at least ten days before taking possession of the subject of said sale, transfer or assignment, or paying therefor, notify the tax commission by registered mail of the proposed sale . . . Within ninety days of receipt of the notice of the sale, transfer or assignment from the purchaser, transferee or assignee, the tax commission shall give notice to the purchaser, transferee or assignee and to the seller, transferor or assignor of the total amount of any tax or taxes which the state claims to be due"

Regulation 20 NYCRR former 537.2(c)(6) provides:

"Every timely notice received more than 10 days prior to the date of taking possession of, or payment for, the business assets shall be deemed to have been received not more than 10 days prior to the date of taking possession of, or payment for the business assets, whichever comes first, regardless of the date when the notice is actually received."

The regulation was promulgated strictly in accordance with statutory procedure. When it was proposed, copies were furnished to the Governor, the Senate, the Assembly, the Administrative Regulation Review Commission and the Office of Business Permits and it was published in the New York State Register of August 4, 1982. The regulation was promulgated on December 16, 1982 filed with the Secretary of State on December 27, 1982 effective December 27, 1982 and published in the New York State Register of January 12, 1983.

The Notice of Claim to Purchaser has the following paragraph:

"Please note that failure to comply with this notice subjects you to personal liability for any sales tax deficiency determined to be due from the seller. The Tax Department has 90 days from the date of receive [sic] of the bulk sale notification to determine the seller's sales tax liability, if any. Every timely notice received more than 10 days prior to the date of taking possession of or payment for the business assets, shall be considered to have been received not more than 10 days prior to the date of taking possession of, or payment on the business assets, whichever comes first, regardless of the date when the notice is actually received. Should a sales tax liability be established to be due from the seller within this time period, an assessment would be issued to the seller and to you, as purchaser. Failure to pay the liability could subject the seller and the purchaser to the issuance

of a warrant and a levy against the business assets to secure payment of the liability."

Petitioner commenced a declaratory judgment action, in Supreme Court, New York County, on the same facts as stated above, seeking to declare the Notice of Determination unenforceable, and to hold the regulation in conflict with the Tax Law. Plaintiff's motion for summary judgment was dismissed by the decision and order of Justice William J. Davis on March 21, 1994.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner maintains that Tax Law § 1141(c) requires notice of the assessment within 90 days of receipt of the notice of sale from the purchaser and that applying such statutory provision to the matter at hand results in notice by the Division which was not timely. In conjunction with such conclusion, petitioner asserts that regulation 20 NYCRR former 537.2(c)(6) ignores the plain meaning of Tax Law § 1141(c) and changes the essential nature of the notice requirement improperly. Petitioner concludes that since the Division did not issue its notices of determination timely (within the statutory 90-day period), such failure released petitioner from liability for sales and use taxes due from the seller.

The Division argues that petitioner was properly assessed for sales tax pursuant to Tax Law § 1141(c) as purchaser of Whaley Enterprises, Inc.

CONCLUSIONS OF LAW

A. Tax Law § 1141(c) provides, in relevant part, as follows:

"Whenever a person required to collect tax shall make a sale . . . in bulk of any part or the whole of his business assets, otherwise than in the ordinary course of business, the purchaser . . . shall at least ten days before taking possession of the subject of said sale . . . or paying therefor, notify the tax commission by registered mail of the proposed sale and of the price, terms and conditions thereof whether or not the seller . . . has represented to, or informed the purchaser . . . that he owes any

Effective September 1, 1987, under Tax Law § 2026 references to the State Tax Commission in the Tax Law, in all instances other than in relation to the administration of the administrative hearing process, are deemed to refer to the Division of Taxation or Commissioner of Taxation and Finance.

tax pursuant to this article, and whether or not the purchaser . . . has knowledge that such taxes are owing, and whether any such taxes are in fact owing.

"... Within ninety days of receipt of the notice of the sale ... from the purchaser ... or assignee, the tax commission shall give notice to the purchaser ... and to the seller ... of the total amount of any tax or taxes which the state claims to be due from the seller ..., and whenever the tax commission shall fail to give such notice to the purchaser ... and the seller ... within ninety days from receipt of notice of the sale ..., such failure will release the purchaser ... from any further obligation to withhold any sums of money, property or choses in action, or other consideration, which the purchaser ... is required to transfer over to the seller"

B. 20 NYCRR former 537.2(c)(6) provided as follows:

"Every timely notice received more than 10 days prior to the date of taking possession of, or payment for, the business assets shall be deemed to have been received not more than 10 days prior to the date of taking possession of, or payment for, the business assets, whichever comes first, regardless of the date when the notice is actually received.

"Example 8: A person purchasing business assets schedules the taking of possession of the assets and payment therefor on April 30, 1982. A notice of the sale is given to the Tax Commission on March 31, 1982. Such notice, although given 30 days before the transfer of possession of the business assets, is deemed to have been received on the tenth day before the transfer takes place."

C. In the Tax Appeals Tribunal's decision in <u>Great South Bay Delicatessen</u> (July 5,

1990), the Tribunal interpreted 20 NYCRR former 537.2(c)(6) as follows:

"The crux of the matter here is the proper date from which to measure the 90 days within which the Division must issue the Notice of Determination and Demand to the purchaser in a bulk sale after the purchaser gives notice of the sale. Section 1141(c) says only that the time runs from the date of 'receipt of the notice of sale' from petitioner. The regulation provides that where the purchaser gives notice more than ten days prior to the sale, the time runs from a 'deemed' date which is the date of 'taking possession of, or payment for, the business assets, whichever comes first, regardless of the date when the notice is actually received' (20 NYCRR former 537.2[c][6]).

"Here, the Notification of Sale in Bulk was dated May 3, 1985 and was received by the Division on May 9, 1985. The notification indicated that the sale was to occur on 'approximately July 15, 1985'. The Notification further indicated that the scheduled date of sale was to be 'within 72 hours of issuance of off premises beer license'.

"The sale of the business actually occurred on July 12, 1985, a fact which petitioner brought to the Division's attention by letter dated July 17, 1985.

"The notices of determination and demands for payment of sales and use taxes due were issued to petitioner on October 2, 1985.

"Applying <u>only</u> the statutory language, the notice would have to be issued within ninety days from May 9, 1985, the date of receipt by the Division of the notice of bulk sale from petitioner. Under these circumstances the notices mailed October 2, 1985 are untimely.

"Applying the regulation, the date of transfer was July 12, 1985; therefore, the deemed date is July 2, 1985. Under these circumstances, the notices mailed October 2, 1985 are untimely. The Administrative Law Judge, in applying the regulation, determined that the 90 days should be measured from the 'deemed' date of July 5, 1985, i.e., ten days prior to the 'approximate' date of July 15, 1985, indicated in petitioner's notice of bulk sale. We disagree. The Administrative Law Judge's conclusion requires reading into the regulation the rule that the 'deemed date' is measured from the date <u>indicated by the purchaser in the notice of sale</u> and not from the date of 'taking possession of, or payment for, the business assets ' This rule is inconsistent with the explicit wording of the regulation. Nor do we find any basis for it implied by the regulation. Adding any such gloss to the regulation is especially inappropriate because the rule that is stated in the regulation is itself such an artificial construction, i.e., deeming the date of receipt to be other than what it was. Certainly, if the Division has the authority to deem the date of receipt to be some other date, it must do so very explicitly and precisely. Accordingly, we find the Administrative Law Judge's determination contrary to the explicit language of the regulation and on this basis we reverse the determination of the Administrative Law Judge and conclude the Division's notices were not timely issued to petitioner." (Emphasis in original.)

D. The matter at hand is a variation on the facts in Great South Bay Delicatessen. Here, the actual sale of the business was on January 1, 1991, the scheduled date of sale as disclosed in petitioner's notification of sale, which was received by the Division on December 17, 1990. (In Great South Bay Delicatessen [supra], the actual sale of the business was on July 12, 1985, three days earlier than the scheduled date of July 15, 1985 disclosed in the notification of sale.) Under petitioner's theory and in strict application of Tax Law § 1141(c) and only such section, the notice of determination alerting petitioner to any claimed amounts due would have to have been mailed by March 17, 1991, or within 90 days from the date petitioner notified the Division of the pending sale. However, this application ignores the intended interplay between section 1141(c) and the regulation at 20 NYCRR former 537.2(c)(6). Applying the explicit wording of 20 NYCRR former 537.2(c)(6), which deems the date of receipt of the notice of sale as "not more than 10 days prior to the date of taking possession of, or payment for, the business assets", results in December 22, 1990 being deemed as the date from which the 90-day statute of limitations under Tax Law § 1141(c) commenced to run. Since the Division mailed the notice of determination on March 22, 1991, such notice would thereby be timely issued.

E. However, it is observed that the Tax Appeals Tribunal's decision in <u>Great South Bay Delicatessen</u> (supra) was in favor of the taxpayer and therefore it was not necessary for it to address the issue concerning the validity of the regulation:

"In view of this conclusion [in favor of the taxpayer], it is not necessary to deal with petitioner's assertion that the Division's regulation is without statutory basis."

However, since an application of the explicit language of 20 NYCRR former 537.2(c)(6) results in a determination adverse to the taxpayer here, it is necessary to determine whether this regulation contravenes Tax Law § 1141(c).

F. In general, the construction given statutes and regulations by an agency responsible for their administration should be upheld if the construction is not unreasonable or inconsistent with the governing statute (Matter of Trump-Equitable Fifth Ave. Co. v. Gliedman, 57 NY2d 588, 457 NYS2d 466, 470; Matter of Velez v. Division of Taxation, 152 AD2d 87, 547 NYS2d 444, 447). In this instance, 20 NYCRR former 537.2(c)(6), which deems a date for receipt of the notification of sale to be a date other than the actual date of receipt, is an "artificial construction" (as noted by the Tax Appeals Tribunal in <u>Great South Bay Delicatessen [supra]</u>) which conflicts with statutory language in Tax Law § 1141(c) that requires the notice of determination to be issued "[w]ithin ninety days of receipt of the notice of the sale." However, this statutory requirement must be read in context. The time limit of "within ninety days of receipt of the notice of the sale" is for the notice to the purchaser in a bulk sale "of the total amount of any tax or taxes which the state claims to be due from the seller . . . " (emphasis added). A literal reading of the "within ninety days of receipt" requirement out of this context, in certain situations, would lead to the inability of the Division to determine "the total amount of any tax or taxes which the state claims to be due from the seller " For example, in the notification of sale received on December 17, 1990, the taxpayer advised that the closing date of the sale was going to be January 1, 1991. Assuming that, in fact, it had taken place on April 15, 1991, the Division would have been precluded from collecting the seller's tax liability (from the purchaser) that arose between the running of the 90-day period following the receipt of the notification of sale (March 17, 1991, which is 90 days from December 17, 1990) and the date of

transfer (April 15, 1991). Such a result would be contrary to the requirement in Tax Law § 1141(c) that "the <u>total amount</u> of any tax" claimed due from the seller be assessed within the 90-day period of limitations.

Furthermore, in Matter of Great South Bay Delicatessen (supra), the Tribunal stated that:

"The purpose of section 1141(c) is twofold: (1) to provide the Division of Taxation with <u>adequate time</u>, prior to the consummation of the sale, to determine whether there are any taxes due the State from the seller of the business and (2) to preserve the Division's ability to collect the seller's liability from the consideration being paid for the assets of the business. The purpose is accomplished by requiring the purchaser to notify the Division of the proposed sale and by requiring the Division to notify the purchaser and the seller of the amount of any outstanding liabilities. This notice secures the Division's first priority right and lien against the consideration for the business." (Emphasis added.)

In sum, 20 NYCRR former 537.2(c)(6) is not unreasonable or inconsistent with Tax Law § 1141(c), the governing statute. Rather, the triggering event for the commencement of the 90-day period in this regulation, "ten days prior to the date of taking possession of, or payment for, the business assets", is a reasonable interpretation that is consistent with the legislative intent concerning Tax Law § 1141(c) -- to provide the Division with adequate time to determine the seller's tax liability and to preserve the Division's ability to collect this liability from the consideration being paid for the assets of the seller's business without unduly delaying business transactions.

G. Turning to the matter of penalties and interest, in Matter of Velez v. Division of Taxation (152 AD2d 87, 547 NYS2d 444, supra) it was held that the Legislature did not intend that a bulk sale purchaser be liable for the penalties and interest assessed against the seller under Tax Law § 1141(c). The court did hold, however, that penalties and interest could be sought from the purchaser for not paying the derivative tax, i.e., upon receipt of the notice of determination.

As indicated in Findings of Fact "6" and "8", the notice of determination for the period September 1, 1989 through January 1, 1991 dated March 22, 1991 was reduced from \$66,886.23 to \$17,077.13 and penalties and interest were assessed at the applicable rate.

Pursuant to Velez, penalties and interest must be computed from the date of the issuance of the

notice of determination (March 22, 1991) to petitioner.

H. The petition of BMW Pizza, Inc. d/b/a Domino's Pizza is hereby denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated March 22, 1991, as modified by the Conciliation Order, is sustained.

DATED: Troy, New York June 22, 1995

> /s/ Catherine M. Bennett ADMINISTRATIVE LAW JUDGE